Supreme Court, U.S.
FILED
JUN 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-2102

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF INDIANA,

Petitioner,

vs.

SIDNEY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit has decided erroneously and in a way in conflict with controlling decisions of this Court that the State of Indiana is liable for the costs of a trial transcript in a case in which the State is not a party and in which the Defendant State employees prevailed.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Facts Material to Consideration of the Question Presented	2
Reasons for Allowance of the Writ	4
The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With Controlling Decisions Of This Court That The State Of Indiana is Liable For The Costs Of A Trial Transcript In A Case In Which The State Is Not A Party And In Which The Defendant State Employees Prevailed	4
Conclusion	7
Appendix:	
Order of the Seventh Circuit, Dated April 4, 1988	A-1
Order of the Seventh Circuit, Dated May 23, 1988	A-2
Judgment of the District Court	A-3

TABLE OF AUTHORITIES

Cases: *Page*

Fairmont Creamery Co. v. Minesota, 275 U.S. 70, 48 S.Ct. 97, L.Ed. 168 6

Hutto v. Finney, 437 U.S. 678, 696 98 S.Ct. 2565, 2567, 57 L.Ed.2d 522 (1978), *rehearing denied*, 439 U.S. 1129 99 S.Ct. 1035 (1979)..... 4, 5, 6

Kentucky v. Graham, ___ U.S. ___ 105 S.Ct. 3099 (1985) 6

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(b) 2

42 U.S.C. § 1983..... 2, 4

42 U.S.C. § 1988..... 6

Rules:

Rule 17.1(c) 2

Rule 20.2 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, the State of Indiana, respectfully prays this Court issue a Writ of Certiorari to review a decree/order of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in cause Number 87-2387 on April 4, 1988 which required the State of Indiana to pay for the preparation of a transcript of a trial in an appeal to which it is not a party and in which the respondent was not the prevailing party.

OPINIONS BELOW

The order of the Seventh Circuit issued April 4, 1988, has not been officially reported. A copy of the Order is appended hereto at page A-1. The Order of the Seventh Circuit, dated May 23, 1988, which denies reconsideration of this order is appended at

page A-2. The Judgment of the District Court is appended at page A-3.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 17.1(c) of the Rules of this Court to review a judgment or decree of a federal court of appeals that has decided a federal question in a way which conflicts with applicable decisions of this court.

The decree of the Seventh Circuit was entered on April 4, 1988. The Motion for Reconsideration was denied on May 23, 1988. This petition is timely filed in that it is filed prior to the expiration of the thirty (30) day period for interlocutory appeals allowed by 28 U.S.C. § 2101(b) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This petition arises from a decree by the Seventh Circuit that the State of Indiana pay for the preparation of a transcript in an appeal to which the State is not a party and in which the respondent was not the prevailing party.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED

Respondent, a prisoner at the Indiana Reformatory filed a civil complaint seeking damages pursuant to 42 U.S.C. § 1983

alleging failure to protect him from assualt by fellow inmates. The complaint named the Petitioner, State of Indiana, and several employees of the State of Indiana as defendants.

Prior to trial the District Court dismissed the State of Indiana as a defendant under the Eleventh Amendment. Retained counsel entered an appearance for Respondent after the complaint was filed but prior to trail. Respondent has been represented by counsel from that point to the present time. This cause of action came trial with four individually named employees of the Indiana Reformatory as the sole defendants.

After a bench trial the District Court entered judgment against the Respondent and in favor of the prison officials. Respondent filed a notice of appeal and a request to proceed in forma pauperis. The District Court denied leave to proceed in forma pauperis on the grounds that the appeal was frivilous. Respondent also requested that the Court of Appeals grant in forma pauperis status which request was denied by the Seventh Circuit.

The Respondent did not cause a transcript of the trial to be prepared. Respondent did not challenge the dismissal of the State of Indiana on appeal. Briefing was completed and the case was set for oral argument on April 4, 1988. At the oral argument the Seventh Circuit ordered the State of Indiana to prepare and file a transcript of the trial proceedings for use in the appeal. The Petitioner filed a Petition for Rehearing, which was construed by the Seventh Circuit as a Motion for Reconsideration, and a Motion for Stay. Both motions were denied by the Seventh Circuit on May 23, 1988.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit Has Decided Erroneously And In A Way In Conflict With Controlling Decisions Of This Court That The State of Indiana Is Liable For The Costs Of A Trial Transcript In A Case In Which The State Is Not A Party And In Which The Defendant State Employees Prevailed

The Seventh Circuit ordered the State of Indiana to pay for a transcript in a § 1983 action for damages. The State was not a party to the appeal and the state employees who were parties to the appeal in their individual capacities had been the prevailing parties in the District Court.

It is true that costs of litigation have "traditionally been awarded without regard for the state's Eleventh Amendment immunity. The court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Hutto v. Finney*, 437 U.S. 678, 696, 98 S.Ct. 2565, 2576, 57 L.Ed.2d 522 (1978), *rehearing denied* 439 U.S. 1129, 99 S.Ct. 1035 (1979). As this Court noted in *Hutto v. Finney, supra*:

> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability.
>
> The power to make the award was supported by "the inherent authority of the Court in the orderly administration of justice as between all parties litigant." *Id.*, at 74, 48 S.Ct., at 99. A federal court's interest in orderly, expeditious proceedings "justifies [it] in treating the state just as any other litigant, and in imposing costs upon it" when an award is called for. *Id.*, at 77, 48 S.Ct., at 100.
>
> Just as a federal court may treat a State like any other litigant when it assesses costs, so also many Congress

> amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amedment immunity.

In cases involving injunctive relief, the Court held in *Hutto v. Finney, supra*, that:

> Although the Eleventh Amendment prevented respondents from suing the State by name, their injunctive suit against prison officials was, for all practical purposes, brought against the State. The actions of the Attorney General himself show that. His office has defended this action since it began. *See Holt I*, 300 F.Supp., at 826. The State apparently paid earlier fee awards; and it was the State's lawyers who decided to bring this appeal, thereby risking another award.
>
> * * * *
>
> Like the Attorney General, Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself. The legislative history makes it clear that in such suits attorney's fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S.Rep.No. 94-1011, p.5 (1976), U.S.Code Cong. & Admin.News 1976, p. 5913. Awards against the official in his individual capacity, in contrast, were not to be affected by the statute; in injunctive suits they would continue to be awarded only "under the traditional bad faith standard recognized by the Supreme Court in *Alyeska*." *Id.*, at 5 n. 7, U.S.Code Cong. & Admin.News 1976, p.5913. There is no indication in this case that the named defendants litigated in bad faith before the Court of Appeals. Consequently, the Department of Correction is the entity intended by Congress to bear the burden of the counsel-fees award.

Id., 437 U.S. at 700-701.1

However, nothing in *Hutto v. Finney, supra*, justifies the Circuit Court's order that the State of Indiana bear the cost of

preparing the transcript in this appeal, nor is there support for such an order from any other source.

Hutto v. Finney, supra, dealt with injunctive relief and was, for all practical purposes, a suit against the State of Arkansas. In the instant case, Jones' suit was a damage claim against specific state employees in their individual capacities in which the State was not a party either constructively or in any other fashion. In *Hutto v. Finney*, the defendant state employees were the losing parties. In the instant case, the defendant state employees were the prevailing party at trial, Jones was the losing party, and the U.S. District Court denied forma pauperis status because it considered the appeal frivilous.

In *Hutto v. Finney* and *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, L.Ed. 168 this Court stated that in regard to awards of costs, a federal court was justified in "treating the state just as any other litigant, and in imposing costs upon it." In *Kentucky v. Graham*, ___ U.S. ___ 105 S.Ct. 3099 (1985), this Court held that *Hutto v. Finney, supra*, did not alter the basic philosophy that liability on the merits and responsibility for costs and fees go hand in hand and that hence where a defendant has not been prevailed against, § 1988 does not authorize a fee award against that defendent, nor did *Hutto v. Finney, supra*, hold or suggest that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity.

In the instant case, unlike the situation in *Hutto v. Finney, supra*, the defendant prison officials were sued in their personal capacities for damages and were the prevailing parties. In light of this Court's opinion in *Kentucky v. Graham, supra*, the Seventh Circuit had no authority to impose the cost of preparing the transcript on the trial on the State of Indiana.

The order of the Seventh Circuit is therefore in direct and irreconcilable conflict with the decisions of this Court in *Kentucky v. Graham, supra*, and *Hutto v. Finney, supra*, and a writ of certiorari should be allowed.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the order for the Seventh Circuit should be granted.

Respectfully submitted,

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Deputy Attorney General

KERMIT R. HILLES
Deputy Attorney General

Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 4, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

SIDNEY JONES,	)
	)
Plaintiff-Apppellant,	) Appeal from the
	) United States Court
No. 87-2378 vs.	) for the Southern
	) District of Indiana,
COUNSEL HAMELMAN,	) Indianapolis Division
SGT. HAMPTON,	) No. IP-84-1199-C
OFFICER LIKENS, and	) J. Patrick Endsley,
OFFICER SWAIN,	) Magistrate.
Defendants-Appellees.	)
	)

ORDER

The State of Indiana is hereby ordered to file a transcript of the trial proceedings before Magistrate Endsley within 10 days if the transcript already has been typed, or thirty days from today if the transcript requires typing.

The Appellant has thirty days from such filing to file a brief relying on the transcript; the State has fifteen days to answer; and the Appellant has ten days in which to reply.

The matter will be submitted to the present panel for decision without further oral argument from either side.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1988.

Before
HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

SIDNEY JONES,	) Appeal from the
	) United States Court
Plaintiff-Apppellant,	) for the Southern
	) District of Indiana,
No. 87-2378 vs.	) Indianapolis Division
	) No. IP-84-1199-C
COUNSELOR HAMELMAN, et al.,	) J. Patrick Endsley,
Defendants-Appellees.	) *Magistrate.*
	)

ORDER

The State of Indiana's motion for stay of this court's April 4, 1988 order directing the State to file a transcript of the trial proceedings before Magistrate Endsley is DENIED.

Moreover, construing the State's petition for rehearing with suggestion for rehearing *en banc* as a motion for reconsideration of our April 4th order, this motion is also DENIED.

The State is hereby ordered to produce the transcript within ten days or in the alternative to present a reasonable timetable for the filing of the transcript.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SIDNEY JONES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP 84-1199-C
	)	
COUNSELOR HAMELMAN,	)	
SGT. HAMPTON,	)	
OFFICER (LACKY) LIKENS, and	)	
OFFICER (SWAINY) SWAIN,	)	
	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint. Costs versus plaintiff.

Dated this 27th day of July, 1987.

/s/ J. PATRICK ENDSLEY,
Magistrate
United States District Court
Southern District of Indiana